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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SANFORD STORM,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Question Presented

Did the District Court erroneously deprive Petitioner of his Sixth Amendment rights (and otherwise place in jeopardy his Fifth Amendment rights) in its denial of a motion by his trial counsel to declare a mistrial and to withdraw as counsel in order to render available a member of his trial counsel's law firm, who was then serving as co-trial counsel, to testify and rebut Government testimony concerning statements allegedly made by co-trial counsel.[1]

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[1] The other party to this proceeding is Jerome Ashfield, a co-defendant. Mr. Ashfield is not a party to this Petition.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND RELEVANT PORTIONS OF AMERICAN BAR ASSOCIATION (ABA) CODE OF PROFESSIONAL RESPONSIBILITY	2
STATEMENT	3
A. Procedural history	3
B. Statement of pertinent facts in relation to question presented	4
REASONS FOR GRANTING THE PETITION	8
A. Strong policies underlie DR 5-102(A)	9
B. The substantial hardship exception (DR 5-101(B)(4)) to DR 5-102(A) is to be narrowly construed	12
C. An interrelationship exists between the unimpairment policy consideration underlying DR 5-102(A) and the Sixth Amendment right to unimpaired representation	13
D. Compliance with DR 5-102 is mandated by Local Rule 6 of the District Court	13

PAGE

E. The overriding policy and constitutional considerations with respect to unimpaired representation underlying the mandate of DR 5-102(A) when considered in conjunction with Fifth and Sixth Amendment rights, constitutes an important question of federal law which has not been, but should be settled by this Court 14

F. The Third Circuit's affirmation of the District Court's denial of motions for a mistrial and to withdraw as counsel was not only inconsistent with the overriding policy considerations underlying DR 5-102(A) and its interplay with the Fifth and Sixth Amendments but also is in conflict with the rulings of other circuits 16

G. Co-trial counsel's testimony was not available from other sources 17

H. Had Petitioner testified in lieu of co-trial counsel, Petitioner would have been required to compromise his Fifth Amendment rights 17

I. In its review of the District Court's ruling on this issue, the Court of Appeals misapplied the substantial hardship exception and otherwise arrived at erroneous conclusions, unsupported by the record 18

J. Co-trial counsel's failure to testify was not a tactical decision 23

CONCLUSION 25

PAGE

APPENDIX:

A—Opinion of the United States Court of Appeals for the Third Circuit 1a

B—Judgment and Probation Commitment Order dated May 10, 1983, and Conditions of Probation and Order of Release dated May 10, 1983, attached thereto 24a

C—Applicable Provisions of the United States Constitution and Other Authorities 31a

Fifth Amendment and Sixth Amendment of the United States Constitution 31a

Relevant Portions of American Bar Association Code of Professional Responsibility 32a

D—Order for Stay of the United States Court of Appeals of the Third Circuit with Attachment 35a

PAGE

Table of Authorities

Cases Cited

Christensen v. United States, 90 F.2d 152 (7th Cir. 1937) 16, 17

Connell v. Clairol, Inc., 440 F.Supp. 17 (N.D. Ga. 1977) 11

Emle Industries v. Patentex, Inc., 478 F.2d 562 (2nd Cir. 1973) 12

General Mill Supply Co. v. SCA Services, Inc., 505 F.Supp. 503 (D. Mich. 1981) 11, 12

Glasser v. United States, 315 U.S. 60 (1942) 13, 15, 19

Hull v. Celanese Corp., 513 F.2d 568 (2nd Cir. 1975) 11

International Electronic Corp. v. Flanzer, 521 F.2d 1288 (2nd Cir. 1975) 10

J.P. Foley & Co. v. Vanderbilt, 523 F.2d 1357 (2nd Cir. 1975) 10

Lau Ah Yew v. Dulles, 257 F.2d 744 (9th Cir. 1958) 10

MacArthur v. Bank of New York, 524 F.Supp. 1205 (S.D.N.Y. 1981) 11, 12, 14, 15

Simmons v. United States, 39 U.S. 377 (1968) 18, 19, 24

United States v. Birdman, 602 F.2d 547 (3rd Cir. 1979) 11

United States ex rel Sheldon Electric Co. v. Blackhawk Heating & Plumbing, Inc., 423 F.Supp. 486 (S.D.N.Y. 1976) 10, 12

United States v. Vereen, 429 F.2d 713 (D.C. Cir. 1970) 11, 16, 17

PAGE

Universal Athletic Sales Co. v. American Gym, Recreational & Athletic Equipment Corp., 546 F.2d 530 (3rd Cir. 1976) 9-11

United States Constitution Cited

Fifth Amendment .....i, 2, 8, 14, 16-20, 23

Sixth Amendment .....i, 2, 8, 14, 16, 18-20, 23

Statutes Cited

26 U.S.C.:

§7201 3

28 U.S.C.:

§1254(1) 2

Rules Cited

Federal Rules of Evidence:

Rule 403 6

Rule 803(6) 21

Other Authorities Cited

American Bar Association Code of Professional Responsibility Disciplinary Rule 5-101 ..... 7, 8

American Bar Association Code of Professional Responsibility Disciplinary Rule 5-101(B)(4) 3, 7, 12, 14, 20

American Bar Association Code of Professional Responsibility Disciplinary Rule 5-102 ..... 7, 8

PAGE

American Bar Association Code of Professional Responsibility Disciplinary Rule 5-102(A) 3, 8-16, 18-20, 24

American Bar Association Code of Professional Responsibility Ethical Consideration 5-9 .....3, 9, 10

American Bar Association Code of Professional Responsibility Ethical Consideration 5-10 .....3, 11, 12, 16

American Bar Association Code of Professional Responsibility Ethical Consideration 7-24 10

American Bar Association Committee on Ethics and Professional Responsibility, Formal Opinion 339 (January 31, 1975) 9, 10, 13, 19

Developments in the Law, *Conflicts of Interest in the Legal Profession,* 94 Harv. L. Rev. 1244 (1981) 10

Note, *The Advocate Witness Rule: If Z, then X But Why?* 52 N.Y.U.L. Rev. 1365 (1977) 9

6 J. Wigmore, *Evidence* §1911 (Chadbourn rev. ed. 1976) 9, 10

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SANFORD STORM,

Petitioner,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioner, Sanford Storm ("Storm") respectfully prays that a Writ of Certiorari issue to review the Opinion of the United States Court of Appeals for the Third Circuit filed on June 1, 1984.

Opinions Below

There was no formal opinion of the District Court. The Judgment and Probation Commitment Order dated May 10, 1983 and Conditions of Probation and Order of Release dated May 10, 1983, are reproduced in Appendix B to this Petition (24a-30a)

The Opinion of the Court of Appeals has not yet been reported. It is reproduced in Appendix A (1a-23a).

Jurisdiction

The Opinion of the Court of Appeals (App. A *infra* 1a-23a) was filed on June 1, 1984. Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, the Court of Appeals stayed issuance of its certified judgment in lieu of formal mandate pending the filing of this Petition, which stay continues until final disposition by this Court (App. D *infra* 35a-37a).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Constitutional Provisions and Relevant Portions of American Bar Association (ABA) Code of Professional Responsibility

1. The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall * * * be compelled in any criminal case to be a witness against himself * * *.

The full text of the Fifth Amendment is reproduced in Appendix C (31a) to this Petition.

2. The Sixth Amendment to the United States Constitution provides in relevant part:

> "In all criminal prosecutions, the accused shall * * * have the Assistance of Counsel for his defence."

The full text of the Sixth Amendment is reproduced in Appendix C (31a) to this Petition.

3. ABA Code of Professional Responsibility:

Disciplinary Rules:

DR 5-102(A)

DR 5-101(B)(4)

Ethical Considerations:

EC 5-9

EC 5-10

The text of the above provisions of the ABA Code of Professional Responsibility is reproduced in Appendix D (32a-34a) to this Petition.

Statement

A. Procedural history.

This case originated from Indictment Cr. 82-125 filed on April 16, 1982 in the United States District Court for the District of New Jersey charging Petitioner and co-defendant, Jerome Ashfield ("Ashfield"), in eight counts with criminal violations of the Internal Revenue Code. Six of the eight counts were dismissed prior to trial on the grounds that they were barred by the statute of limitations.

Trial on the remaining two counts, one against Petitioner and one against Ashfield, each of which charged an attempt to evade personal income tax for the calendar year 1975 (26 U.S.C. §7201), commenced on January 31, 1983 before the Honorable John W. Bissell, United States District Judge, and a jury.

On February 9, 1983 the jury returned a verdict of guilty against both Petitioner and Ashfield.[2]

On April 11, 1983, the District Court denied Petitioner's motion for a judgment of acquittal or, in the alternative, for a new trial. The District Court granted Ashfield's motion for a judgment of acquittal.

On May 10, 1983 Petitioner was sentenced to a two-year term of imprisonment, execution of which was suspended except for 90 days, with a three year term of probation to follow, and was fined $5,000.00. Petitioner is at liberty on bail pending this appeal.

Separate appeals were filed by the Government, Petitioner and Ashfield from the District Court's post conviction orders and consolidated for consideration by the United States Court of Appeals for the Third Circuit.

On June 1, 1984 the Court of Appeals filed an Opinion which affirmed the judgment of conviction against Petitioner and reversed the judgment of acquittal in favor of Ashfield and remanded Ashfield's case to the District Court for action consistent with its Opinion (App. A *infra* 1a-23a).

B. Statement of pertinent facts in relation to question presented.

The gist of the Government's case was that in 1975 $28,000.00 in commission income received by National Talent Associates, Inc. ("NTA"), in which Petitioner and Ashfield were 50 percent shareholders, had been improperly credited by Giblen & Co., NTA's certified public

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[2] The Government's proofs alleged that Petitioner and Ashfield each attempted to evade the tax on $14,000.00 of income which was not reported on their respective 1975 Federal income tax returns.

accountants, to the corporation's officers' loans account in its general ledger in the amount of $14,000.00 each to Petitioner and Ashfield. These credits were deemed constructive dividends which were not reported on the personal income tax returns of Petitioner and Ashfield, which had been prepared by Giblen & Co.

Petitioner and Ashfield did not challenge the understatement of income. Their defense rested upon lack of willfulness and the result of error by their accountants.

The question presented herein arose within the following context. Petitioner was jointly represented at trial by Howard D. Cohen, Esq. ("Cohen") and Jerome R. Miller, Esq. ("Miller"), members of the New Jersey law firm of Gutkin, Miller, Shapiro & Selesner, P.A. Although Cohen acted as lead trial counsel, Miller entered his appearance as co-counsel for Petitioner at trial, participated in jury selection, sat at counsel's table, was introduced to the jury as one of Petitioner's trial attorneys, and otherwise continued as Petitioner's attorney.

During the course of trial, the Government made an offer of proof of its intention to introduce testimony of IRS Special Agent Michael R. Faiella ("Faiella") concerning certain alleged statements made by Miller to Faiella at a meeting in September, 1978. The meeting took place in the presence of Petitioner and another IRS Special Agent and related to the production of NTA books and records in response to an IRS Summons issued on August 16, 1978 in connection with a then pending civil tax audit of NTA. The Government alleged through the testimony of Faiella that Miller purportedly told Faiella that all of the documents forming the subject of the Summons had been produced.

Counsel for Petitioner objected to the introduction of this testimony and requested and was granted an evidentiary hearing outside the presence of the jury. At that hearing, Special Agent Faiella testified (without corroborative support from his contemporaneously made interview notes or memorandum) that he had been told by Miller at the September, 1978 meeting that all records had been produced.

Faiella further testified that, following issuance of a subsequent IRS Summons to the National Community Bank, it was determined that ledgers and bank records relating to a certain Management Trust Account of NTA (into which was originally deposited NTA's commission income) had not been produced.

The Government argued that the original non-production of these records was part of a cover up to present the disclosure of documents that ultimately led to the indictments returned against Petitioner and Ashfield.

Notwithstanding Miller's unequivocal denial in the evidentiary hearing of ever having stated to Faiella that all documents had been produced, the District Court denied Petitioner's motions to reject the testimony of Faiella pursuant to Rule 403 of the Federal Rules of Evidence or, in the alternative, to declare a mistrial and/or to withdraw as counsel.

The application for a mistrial and/or to withdraw as counsel was premised upon the following:

> (a) Miller had entered his appearance as co-counsel for Petitioner at trial, participated in jury selection, sat at counsel's table, was introduced to

the jury as one of Petitioner's trial attorneys and otherwise continued as Petitioner's attorney;

(b) Miller's law partner, Cohen, was Petitioner's lead trial counsel; and

(c) Miller's testimony would be required if Faiella was permitted to testify concerning the September, 1978 meeting.

Based upon the above, Cohen advised the District Court that under DR 5-101 and 5-102 of the ABA Code of Professional Responsibility, an attorney cannot act as a witness in a proceeding in which he appears as counsel.

The District Court, in denying Petitioner's application, stated it was doing so based upon "its inherent powers with regard to smooth and expeditious disposition of cases, keeping in mind, among other things, the considerations of the Speedy Trial Act and others determining the granting of a mistrial in this instance or the granting of an application to withdraw as counsel". The District Court also expressed the view that under the substantial hardship exception, DR 5-101(B)(4), Petitioner's attorneys ought to continue in their representation and that Miller could testify without his firm being required to withdraw as counsel.

Certain guidelines were fixed by the District Court with respect to the further conduct of trial including a prohibition against the use of Miller's name in the context of testimony and directing any references to Miller to be expressed in terms of "Storm's attorney" or other similar references; the Court also prohibited Miller from further participation as trial counsel.

Based upon the prohibition of DR 5-102(A), counsel for Petitioner then moved to be relieved as counsel in order

to avoid any intentional violation of that disciplinary rule. That motion was also denied and counsel was ordered to proceed in his representation of Petitioner.

During the course of trial, neither Miller nor the Petitioner testified before the jury to rebut Faiella's testimony concerning the September, 1978 meeting.

On appeal Petitioner unsuccessfully argued that the District Court's refusal to grant a mistrial constituted error requiring a new trial.

REASONS FOR GRANTING THE PETITION

This case presents a question of novel impression to this Court involving the delicate balancing of the underlying policy considerations of DR 5-101 and 5-102 of the ABA Code of Professional Responsibility and an individual's Fifth and Sixth Amendment rights, which is of substantial importance as a matter of federal law, and which should be settled by this Court.

DR 5-102(A) of the Code of Professional Responsibility provides:

> "If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation or he and a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B)(1) through (4)."

A. Strong policies underlie DR 5-102(A).

Calling a party's attorney as a witness undermines the integrity of the judicial process. *See generally* 6 J. Wigmore, Evidence §1911 (Chadbourn rev. ed. 1976); Note, *The Advocate Witness Rule: If Z, then X. But Why?* 52 N.Y.L.J. Rev. 1365 (1977); American Bar Association Committee on Ethics and Professional Responsibility, Formal Opinion 339 (January 31, 1975).

These policies are amplified in Ethical Consideration 5-9 (EC 5-9) which states, in pertinent part:

> "Occasionally a lawyer is called upon to decide in a particular case whether he will be a witness or an advocate. *If a lawyer is both counsel and witness, he becomes more easily impeachable for interest, and thus may be a less effective witness.* Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. *An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and a witness are inconsistent;* the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively." (Emphasis Added).

DR 5-102(A) implicitly recognizes the potential conflict of interest with which an attorney may be faced in this situation. Attorneys anxious to participate in the litigation might fail to step aside as counsel and testify even if their testimony could help the client; other attorneys might fail to step aside and testify because the client insists upon their continued representation. EC 5-9. See *Universal Athletic Sales Co.* v. *American Gym,*

Recreational & Athletic Equipment Corp., 546 F.2d 530, 539-40 (3rd Cir. 1976); *Lau Ah Yew* v. *Dulles*, 257 F.2d 744, 746 (9th Cir. 1958). Thus, the jury may discount the weight and credibility of testimony needed by the client to the client's detriment. American Bar Association, Committee on Ethics and Professional Responsibility, Formal Opinion 339, P. 2 (January 31, 1975). The Code of Responsibility seeks to prevent such conflicts by keeping separate the roles of attorney and witness. EC 5-9.

The Bar is ill served when an attorney's veracity becomes an issue in a case; lay observers especially might speculate whether counsel has compromised his integrity on the stand in order to prevail in the litigation. See *International Electronic Corp.* v. *Flanzer*, 521 F.2d 1288, 1294 (2d Cir. 1975); *United States ex rel. Sheldon Electronic Co.* v. *Blackhawk Heating & Plumbing Co.*, 423 F.Supp. 486, 489 (S.D.N.Y. 1976); 6 J. Wigmore, *supra*, §1911; Cf. EC 7-24 (attorney may not claim innocence of client or justness of position to the jury). Further, having seen the attorney take an oath on the witness stand, the jury might accord testimonial weight to his closing arguments, or might simply place undue weight on the testimony of a court officer. See Developments in the Law, *Conflicts of Interest in the Legal Profession*, 94 Harv. L. Rev. 1244, 1290 (1981).

DR 5-102(A) applies when a lawyer "ought to be called as a witness on behalf of his client." That the lawyer may not actually testify is not controlling. What matters is that he ought to testify. See *J.P. Foley & Co.* v. *Vanderbilt*, 523 F.2d 1357 (2d Cir. 1975). *The test is therefore whether the attorney's testimony could be significantly useful to his client; if so, he ought to be called.*

The provisions of DR 5-102(A) are mandatory: the party cannot choose between the attorney's testimony and his representation. The rule embodies a conclusive preference for testimony: "Where the question [of testimony versus representation] arises doubts should be resolved in favor of the lawyer testifying and against his becoming or continuing as advocate. EC 5-10. A party can be represented by other attorneys, but cannot obtain substitute testimony for a counsel's relevant, personal knowledge. See *MacArthur* v. *Bank of New York,* 524 F.Supp. 1205, 1209 (S.D.N.Y. 1981). See also *Hull* v. *Celanese Corp.,* 513 F.2d 568, 571 (2d Cir.); *Connell* v. *Clairol, Inc.,* 440 F.Supp. 17, 19 (N.D. GA. 1977); *United States* v. *Vereen,* 429 F.2d 713, 715 n.3 (D.C. Cir. 1970). See generally *Universal Athletic Sales Co.* v. *American Gym, Recreational & Athletic Equipment Corp., supra* at 538-40; *United States* v. *Birdman,* 602 F.2d 547, 551-53 (3rd Cir. 1979).

In deciding whether an attorney should be disqualified, courts have balanced the interests underlying the rule against the potential damage to the client. See *General Mills Supply Co.* v. *SCA Services, Inc.,* 505 F.Supp. 1093, 1096 (D. Mich. 1981).

Absent extreme hardship to the client, the mandate of DR 5-102(A) has been strictly invoked:

> "Aside from the likelihood of actual prejudice . . ., the court must be mindful of the possibility that testimony by an attorney in the case may lead the public to think 'that lawyers may as witnesses distort the truth' thereby diminishing the public's respect for and confidence in the profession. . . . Where doubt may becloud the public's view of the ethics of the legal profession and thus impune the integrity of the judicial process, it is the re-

> sponsibility of the Court to insure that the standards of ethics remain high." *United States ex rel. Sheldon Electric Co.* v. *Blackhawk Heating & Plumbing, Inc.*, 423 F.Supp. 486, 489 (S.D.N.Y. 1976), quoted in *General Mill Supply Co.* v. *SCA Services, Inc., supra* at 1098.

The Rule controls irrespective of when the need for the attorney's testimony becomes evident:

> "Regardless of when the problem arises the [lawyer's] decision is to be governed by the same basic considerations." EC 5-10.

The mandatory ethical obligations imposed by DR 5-102(A) cannot be overcome by the equitable defenses of laches, waiver, or estoppel. *Emle Industries, Inc.* v. *Patentex, Inc.*, 478 F.2d 562, 574 (2d Cir. 1973).

B. The substantial hardship exception (DR 5-101(B)(4)) to DR 5-102(A) is to be narrowly construed.

Courts have narrowly construed the substantial hardship exception (DR 5-101(B)(4)). Hardship alone, however substantial, is insufficient to permit continued representation. *The deprivation to the client will be greatest precisely when the attorney was most intimately involved in, and familiar with, the events giving rise to the suit.* See e.g. *United States ex rel. Sheldon Electric Co.* v. *Blackhawk Heating & Plumbing, Inc.*, 423 F.Supp. at 490. Withdrawal will be costly whenever it occurs. *But if the expense in delay routinely incident to disqualification satisfied the substantial hardship exception, that exception would soon swallow the Rule.* See *MacArthur* v. *Bank of New York, supra* at 1210.

C. An interrelationship exists between the unimpairment policy consideration underlying DR 5-102(A) and the Sixth Amendment right to unimpaired representation.

The fundamental policy consideration underlying the mandate of DR 5-102(A) requiring counsel to withdraw from the conduct of trial where he or a lawyer in his firm ought to be called as a witness on behalf of his client to address a contested issue is well stated in Formal Opinion 339, *supra*:

> "The client's need for the testimony from a disinterested source and the client's entitlement to an advocate whose effectiveness cannot be impaired because of his advocate having been a witness as to contested issues are the foundation of DR 5-102(A)."

These policy considerations accord with this Court's previous holding that in order to guarantee a defendant effective assistance of counsel, consistent with his Sixth Amendment rights, such representation must be "untrammeled and unimpaired." *Glasser* v. *United States,* 315 U.S. 60, 70 (1942).

D. Compliance with DR 5-102(A) is mandated by Local Rule 6 of the District Court.

Further emphasis upon compliance with the proscriptions of the Disciplinary Rules of the Code of Professional Responsibility is found in Local Rule 6 of the District Court for the District of New Jersey which provides:

> "The Disciplinary Rules of the Code of Professional Responsibility of the American Bar Association as amended by the Supreme Court of New

Jersey and the Code of Judicial Conduct of the American Bar Association, shall govern the conduct of the judges and members of the Bar admitted to practice in this Court."

E. The overriding policy and constitutional considerations with respect to unimpaired representation underlying the mandate of DR 5-102(A) when considered in conjunction with Fifth and Sixth Amendment rights, constitutes an important question of federal law which has not been, but should be settled by this Court.

We respectfully submit, that the decisions by the District Court and Court of Appeals with respect to this issue were erroneous in that they operated to materially impair Petitioner's Fifth and Sixth Amendment rights.

The District Court's refusal to grant Petitioner's motions for a mistrial and to withdraw as counsel, and the Court of Appeals affirmation of the District Court's ruling on this issue manifest a failure to acknowledge the substantial policy and constitutional considerations underlying the mandate of DR 5-102(A) and its interplay with an individual's Fifth and Sixth Amendment rights.

Instead, both the District Court and the Court of Appeals erroneously applied the "substantial hardship" exception (DR 5-101(B)(4) to DR 5-102(A)). A fair reading of the substantial hardship exception and the narrow construction to be accorded to it, *MacArthur, supra* at 1210, within the factual context of this case demonstrates that it was misapplied thereby seriously impairing Petitioner's Fifth and Sixth Amendment rights.

It is the "exceptional situation" where a lawyer is permitted to act as a witness. A showing that it would be "manifestly unfair" or that an "unreasonable hard-

ship" *would be imposed upon the client* is required to permit the lawyer-witness to continue. EC 5-10. No such circumstances existed herein. First, Petitioner did not seek to have Messrs. Cohen and Miller continue as his attorneys. Petitioner was prepared to incur whatever additional expense was required in obtaining new counsel in order to insure a fair trial. Second, the matter on which Miller was to testify went to the heart of the prosecution's case—whether or not Petitioner acted willfully. Were Miller's testimony even, in part, disbelieved or doubted, the credibility of Petitioner's trial counsel would inevitably have been affected adversely in the eyes of the jury. Third, Miller was subject to impeachment for interest. This needlessly would have then undermined his credibility. Fourth, in view of the conflicting hearing testimony of Special Agent Faiella and Miller, counsel would have been required to argue Miller's credibility. Such a result is expressly condemned in Formal Opinion 339 which states that in the exceptional circumstance where a lawyer does act as a witness "[h]e should also refrain from expressly arguing the credibility of his own testimony *or that of a lawyer in his firm*". (Emphasis Added), P. 4. Petitioner's representation would thereby have been seriously undermined.

There was no justification for Miller and Cohen and their firm to continue as counsel. Even assuming that the substantial hardship exception did apply, the hardship to Petitioner in such circumstances having Cohen and Miller continue as trial counsel was far greater than in having them withdraw. Petitioner's Sixth Amendment right to unimpaired representation was undermined and the very foundation of DR 5-102(A) was disregarded. See *MacArthur, supra* at 1210; *Glasser, supra* at 70.

The inconvenience from a mistrial would not have been substantial. There had been only four days of trial

when the motion for mistrial was made. Any doubts about a lawyer testifying should be resolved in favor of the lawyer testifying and against his continuing as counsel. EC 5-10.

F. The Third Circuit's affirmation of the District Court's denial of motions for a mistrial and to withdraw as counsel was not only inconsistent with the overriding policy considerations underlying DR 5-102(A) and its interplay with the Fifth and Sixth Amendments but but also is in conflict with the rulings of other circuits.

In *Christensen* v. *United States,* 90 F.2d 152 (7th Cir. 1937), the defendant sought to call as a witness (like Miller) who had participated in the trial, but was not lead counsel. The attorney's testimony was needed to rebut a witness' claim that she made a false written statement at the request of the defendant. The statement had been prepared by the attorney, who also met with the witness. The District Court refused to permit the attorney to testify. The Seventh Circuit reversed, holding that the attorney was a competent witness and that the District Court should have excluded the attorney from further participation in the trial to enable him to testify for the defendant.

In *United States* v. *Vereen,* 429 F.2d 713 (D.C. Cir. 1970), the defendant sought to introduce the testimony of his defense counsel in connection with a pre-trial office interview conducted by the attorney with the complaining witness. The witness' statements to the attorney at the interview conflicted with his testimony at trial. Thus, the defense counsel's proffered testimony drew into question the complaining witness' credibility. The District Court denied counsel's motion to withdraw so that he could be called as a witness. The Court of Appeals reversed, holding that the defendant's attorney should have been permitted to withdraw and to testify:

> "(A)fter counsel found himself in these circumstances, his suggested solution—personally to withdraw without any trial delay, substitute an associate as counsel, and then take the stand—was manifestly appropriate." 429 F.2d at 715.[3]

Both the *Christensen* and *Vereen* cases confirm that when an attorney is required to testify, he should not be permitted to continue in the case. The Third Circuit's opinion in the case herein is at variance with these decisions of the Seventh and D.C. Circuits.

G. Co-trial counsel's testimony was not available from other sources.

At the evidentiary hearing before Judge Bissell, Miller testified concerning a telephone conversation with Special Agent Faiella. No one else was party to that conversation and Miller was the only witness available to contradict Special Agent Faiella's recollection of the September 1978 meeting attended by Special Agents Faiella and Donovan, Miller and Petitioner. During the evidentiary hearing, the Assistant United States Attorney stated that Special Agent Donovan's testimony would be similar to Special Agent Faiella's.

H. Had Petitioner testified in lieu of co-trial counsel, Petitioner would have been required to compromise his Fifth Amendment rights.

Petitioner would not have been an effective witness as to what transpired at the September, 1978 meeting.

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[3] The Circuit Court held it was error not to allow defense counsel to withdraw even though the circumstance of the defense attorney having to testify resulted from defense counsel's failure to have another person present at the witness interview—contrary to the standards announced in the ABA Project on Minimum Standards for Criminal Justice.

Even assuming that Petitioner recalled what Miller had said at that meeting, his recollection would have been attacked as affected by his own self-interest. More significantly, however, by testfying, Petitioner would have waived his Fifth Amendment privilege against self incrimination. On this particular issue, this Court's previous holding in *Simmons* v. *United States,* 390 U.S. 377, 394 (1968) is clear and unequivocal:

> "We find it intolerable that one Constitutional right should have to be surrendered in order to assert another."

Here, because Miller was precluded by the District Court's ruling from being an effective witness, Petitioner's right to present a defense was impermissibly conditioned upon his taking the stand and waiving his privilege against self-incrimination. While it may appear that Petitioner had the option of testifying or deciding to refrain from testifying and thereby forego a benefit, in reality, he had no option at all. "[A]n undeniable tension" was created between his Fifth Amendment right not to testify and his Sixth Amendment right to effective assistance of counsel, which we submit would have been seriously impaired were Miller to testify. Cf. *Simmons* v. *United States, supra* at 394; *Glasser* v. *United States, supra* at 70.

I. In its review of the District Court's ruling on this issue, the Court of Appeals misapplied the substantial hardship exception and otherwise arrived at erroneous conclusions, unsupported by the record.

We respectfully submit the Court of Appeals misapplied the substantial hardship exception to DR 5-102(A). This is so because of the critical nature of the testimony which only Miller, but for his status as co-trial counsel, was in

a position to offer. There is a clear incompatibility of having an attorney, whose firm remains as trial counsel, testify under the substantial hardship exception to DR 5-102(A) as to a contested issue that goes to the heart of defendant's defense—lack of wilfulness—and the defendant's Sixth Amendment right to effective assistance of counsel which is impaired by such testimony. For looming on the horizon is the prospect that the credibility of the testifying attorney will be challenged by the Government in both cross examination and later argued before the jury in summation. This, in turn, leads to the untenable result of Petitioner's trial counsel being forced to argue the credibility of a member of his law firm before the jury at the time of summation—a result specifically deplored by Formal Opinion 339.

Petitioner was therefore left with the following equally unattractive options:

1. Allowing his attorney to testify, thereby impairing his Sixth Amendment rights to effective assistance of counsel, contrary to the spirit of this Court's holding in *Glasser, supra* at 70.

2. Waiving his Fifth Amendment privilege against self-incrimination in order to rebut the Special Agent's testimony, in lieu of having his attorney testify, thereby resulting in Petitioner's surrender of his Fifth Amendment right in order to preserve his Sixth Amendment right, a result specifically deplored by this Court in *Simmons* v. *United States, supra* at 394.

3. Leaving the Government testimony, which went to the heart of Petitioner's defense, unrebutted in deference to preservation of Petitioner's Fifth and Sixth Amendment rights.

Had the District Court properly applied the proscription of DR 5-102(A) and not misapplied the substantial hardship exception under DR 5-101(B)(4), we submit Petitioner would never have found himself faced with this constitutional dilemma.

The Court of Appeals, in affirming the District Court's application of the substantial hardship exception, expressed the view that the "longtime involvement of Miller's law firm, both in the IRS investigation and in the trial preparation . . . would have worked a substantial hardship on [Petitioner]". We respectfully disagree. Given Petitioner's lack of objection to counsel's motion to withdraw, coupled with Petitioner's Fifth and Sixth Amendment rights and the delicate balancing of those rights with the underlying foundation to DR 5-102(A), we submit a far greater hardship was practiced upon Petitioner in the District Court's denial of the motions for a mistrial and to withdraw as counsel.

We respectfully reject the Court of Appeals conclusion that the potential of Miller having to testify to rebut Special Agent Faiella's testimony concerning production of the records should have been anticipated by Petitioner's attorneys. Contrary to the findings by the Court of Appeals in its Opinion, which we submit resulted from a misstatement of the facts by the Government in its Briefs and are otherwise unsupported by the record, Petitioner's trial counsel was never alerted during the pretrial proceedings that Miller's testimony might be required with respect to a contested issue, thereby raising the possibility of Miller's credibility being brought into question. A search of the record will reveal that at no time did the Government ever place Petitioner's trial counsel on notice that Miller's credibility would be brought into question through the proffer of Special Agent Faiella's testimony concerning production of the records.

There were at least three occasions on which the Government could have so alerted trial counsel and apparently elected not to do so. The first occasion occurred shortly after return of the indictments when the Government moved to disqualify Miller's firm from representing both Petitioner and co-defendant Ashfield. The Government's motion papers made no reference to the likelihood of Miller's testimony at trial on a matter of substance. The only reference in the Government's motion was with regard to the possibility of Miller testifying about custody of NTA's records. Even the trial judge acknowledged that the disqualification motion was the appropriate time for the Government to disclose all relevant facts relating to the possibility of Miller being called as a trial witness. Further, prior to trial, counsel entered into a Stipulation with the Government providing that the requirements of Federal Rule of Evidence 803(6) were satisfied with respect to the documents of NTA. The Stipulation specifically provided that its purpose was "to eliminate the need for calling a custodian of records to testify in order to lay a foundation pursuant to Federal Rule of Evidence 803(6) for documents of NTA . . ." Thus, the prospect of Miller being called to testify as a custodian of records was disposed of prior to the commencement of trial and trial counsel was never placed on notice that Miller might be required to testify as to a matter of substance.

The second occasion on which the Government could have so advised counsel of the possibility that Miller might be required to testify as to a matter of substance arose immediately before the commencement of trial when the Government sought to introduce a certain memorandum from a Special Agent named Bailey. Here, again, the Government made no mention of Miller's alleged statement to Special Agent Faiella concerning production of documents, nor was the alleged admission contained in

any Jencks Act material produced to Petitioner's counsel. Further, Judge Bissell, in denying the Government's application to introduce the Bailey memorandum, specifically stated that it would be unfair to place Miller's credibility in question by allowing Bailey's memorandum in evidence, particularly given the Government's laches in failing to disclose during the motion to disqualify that Miller's testimony was needed on substantive matters.

The third occasion on which the Government could have informed counsel that Miller might be required to testify to a substantive matter also arose at the commencement of trial in connection with the identification of certain disbursement sheets which Miller identified to IRS Special Agents at the critical September, 1978 meeting, as having been prepared by Petitioner. The admissibility of the disbursement sheets was disposed of by way of stipulation of counsel. Significantly, while the Government specifically dealt with the September, 1978 meeting in relation to the disbursement sheets, it never advised trial counsel at that time that it also intended to place Miller's credibility in question through the testimony of Special Agent Faiella concerning the production of documents.

Thus, prior to the commencement of trial, both the District Court and Petitioner's attorneys believed that they had disposed of all outstanding issues relating to the possibility of Miller having to testify, and, further, had no reasonable basis upon which to anticipate that Miller's credibility would be ultimately brought into question.

Even in the Government's opening statement no reference was made to the alleged statement by Miller to Faiella concerning the production of documents.

We therefore respectfully submit that the record fails to support the conclusion by the Court of Appeals that the Petitioner's trial counsel should have anticipated the prospect of Miller's credibility being brought into question with respect to the September 1978 meeting. The record is barren of any such knowledge or advance notice. To the contrary, the record below and the pretrial proceedings reflect a *bona fide* effort on the part of trial counsel to dispose of all matters relating to the prospect of Miller's testimony on non-substantive matters and the lack of any knowledge or notice from the Government that Miller's testimony might be required with respect to substantive matters. The mere fact that Miller had encounters with the Government during the civil tax audit of NTA and subsequent criminal investigation of its principals does not necessarily lead to the conclusion that Petitioner's trial counsel should have concluded that Miller would be required to testify as to a substantive matter absent some notice from the Government or indication in the documents exchanged prior to trial that Miller's credibility would be placed in issue by the Government. No such indication was ever given. Petitioner's attorneys reasonably concluded prior to trial that there was no foreseeable prospect of Miller having to testify. In fact, the trial judge also similarly concluded within the context of the Faiella/Miller issue that ultimately developed at trial, specifically finding that the development of the problem during the trial was not "entirely foreseeable" by Petitioner's attorneys.

J. Co-trial counsel's failure to testify was not a tactical decision.

Contrary to the Government's arguments adopted by the Third Circuit, Miller's failure to testify was not

"trial tactics" but rather based upon the serious dilemma posed by the foundation of DR 5-102(A) and Petitioner's corresponding Fifth and Sixth Amendment rights to unimpaired representation and privilege against self-incrimination discussed hereinabove. In fact, prior to Special Agent Faiella's testimony before the jury, Petitioner's trial counsel stated:

> "I do not want the record to reflect in any way that I am now voluntarily participating in this trial. I do not want to be subject to disciplinary proceedings, and I respectfully move first, for a mistrial, and secondly, if the Court is not willing to grant a mistrial, I request to be relieved as counsel because I will not intentionally violate a disciplinary rule."

We respectfully submit that overriding ethical considerations and preservation of Fifth and Sixth Amendment rights, under the circumstances herein, mandate, as a matter of federal law, the disqualification of trial counsel and his firm pursuant to DR 5-102(A). Such a result is necessary in order to insure that an individual's Fifth and Sixth Amendment rights are protected. Anything less, we submit, potentially places that individual in the untenable position of having to make the intolerable decision as to whether to forego one constitutional right in order to assert another, a result specifically rejected by this Court. See *Simmons* v. *United States, supra* at 394.

The question herein presents an important issue of federal law involving the delicate balancing of the policy considerations of the Disciplinary Rules and an individual's Fifth and Sixth Amendment rights that should be conclusively settled by this Court.

CONCLUSION

For the foregoing reasons, we respectfully submit the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: July 31, 1984

[APPENDICES FOLLOW]

APPENDIX A

Opinion of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 83-5344, 83-5380, 83-5384

UNITED STATES OF AMERICA,
Appellant in No. 83-5344
Appellee in No. 83-5380
Cross-Appellee in No. 83-5384

v.

JEROME ASHFIELD,
Appellee in No. 83-5344
Cross-Appellant in No. 83-5384

v.

SANFORD STORM,
Appellant in No. 83-5380

On Appeal from the United States
District Court for the
District of New Jersey
(Crim. Nos. 82-125-01 & 02)

Argued February 27, 1984

Before: ADAMS, SLOVITER, *Circuit Judges*,
and TEITELBAUM, *District Judge**

(Opinion Filed June 1, 1984)

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* Hon. Hubert I. Teitelbaum, United States District Court for the Western District of Pennsylvania, sitting by designation.

Appendix A

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Appendix A

OPINION OF THE COURT

ADAMS, *Circuit Judge*

This appeal comes to us from the trial of Sanford Storm and Jerome Ashfield, two business associates who were charged with attempted evasion of personal income taxes. After a jury returned guilty verdicts against each defendant, the trial court sustained Storm's conviction, but ruled that the evidence against Ashfield was insufficient and entered a judgment of acquittal in his favor. On appeal, a careful examination of the record leaves us satisfied that Storm's conviction should be affirmed. We are, however, compelled to differ with the trial court's weighing of the evidence against Ashfield. While the record here, as with most white-collar crimes, consists of a complex web of inferential proof, we are persuaded that the evidence is sufficient to support the jury's verdict against Ashfield. We therefore reverse the judgment of acquittal for Ashfield and affirm the conviction of Storm.

I.

Storm and Ashfield are the sole shareholders and officers of National Talent Associates (NTA), a closely held corporation that placed child models for television, magazine and catalog advertising. NTA essentially acted as a referral service for another, larger talent agency. After locating interested parents by direct mail, NTA would select suitable children, execute a 5-year contract with the parents, photograph the aspiring child model, and send the picture to the Schuller Talent Agency, which would in turn accept about one in twenty referrals, and arrange job interviews for them. For this service, NTA charged a one-time fee of $135 to $165 when the contract was

signed. Thereafter, NTA received a commission of 10% of a child's earnings up to $1000, and 15% of any additional earnings.

NTA established two corporate bank accounts. The first, the management trust account, was the repository for compensation paid by employers for the work of the child models. From these payments, NTA deducted its commission and sent a check for the remainder to the client. NTA's commission earnings were then transferred to the second corporate account, the operating account.

Within NTA's operating account were various categories such as commission income (the 10% or 15% fees transferred from the management trust account), sales income (the $135 to $165 one-time registration fee), and officers' loans receivable (outlays and repayments for personal expenses of Storm and Ashfield).[1] All payments to the operating account were credited as sales income, unless specifically designated for deposit to some other category.

During an audit of NTA, the Internal Revenue Service (IRS) discovered that between 1973 and 1975 almost $60,000 from the trust account was deposited in the officers' loans account and credited in equal amounts to Storm and Ashfield as repayment of personal loans. As a result of these loan repayments, each defendant in effect received $30,000 in dividends that twice escaped taxation. Because the deposits were never listed as income to NTA, no corporate tax was paid on them, and because the deposits were never reported as income to Storm and Ashfield, no personal tax was paid on them.

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1. Through this officers' loans account, Storm and Ashfield borrowed from corporate funds to pay for such personal expenses as rent, college tuition, tax bills, and even a cemetery plot. App. at 528a-538a.

Appendix A

In April 1982, Storm and Ashfield were indicted on eight counts of evading corporate and personal income tax in 1974 and 1975. Six of the eight counts were, however, dismissed as barred by the statute of limitations, leaving only two counts in place: one count each for Storm and Ashfield for attempted evasion of personal income tax in 1975.[2]

At trial, the defendants did not contest that the loan repayments had been incorrectly credited to them. Rather, the defense asserted lack of "willfulness" on the part of Storm and Ashfield. In particular, Storm attempted to show through cross-examination of the government's witnesses that the repayments were erroneously recorded because of a mistake by NTA's accounting firm. Ashfield's defense was that he had no control over NTA's accounting practices and that he was unaware of the errors. Neither Storm nor Ashfield took the stand, and no other witness testified on behalf of the defense.

On February 9, 1983, the jury returned a guilty verdict against each defendant. But on April 11, 1983, the district court granted a motion for acquittal of Ashfield, ruling that "reasonable minds could not have concluded that all of the elements of the crime charged were established beyond a reasonable doubt...." App. at 44a. The district court, however, left in place the jury's guilty verdict against Storm, and on May 19, 1983, sentenced him to 90 days imprisonment, three years probation, and a $5000 fine. Timely appeals were filed by Storm, by the government (appealing Ashfield's

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2. Specifically, Count 1 of the indictment alleged that Storm "did knowingly and willfully attempt to evade and defeat a large part of the income tax due and owing by him to the United States for calendar year 1975 ... [i]n violation of Title 26, United States Code, Section 7201." App. at 19a. Count 2 alleged the same crime by Ashfield. App. at 20a.

acquittal) and by Ashfield (defensively cross-appealing the trial court's denial of his motion for a new trial).

II.

Although both defendants assert that the district court committed errors requiring us to order a new trial, the central issue before us is the sufficiency of the evidence against Storm and, particularly, against Ashfield. Because a ruling that the proof adduced at trial was inadequate would be dispositive of both of the defendants' appeals, we consider that issue first.

A.

To establish guilt of tax evasion under 26 U.S.C.A. § 7201 (West Supp. 1983), the government must show: (1) the existence of a tax deficiency, (2) an affirmative act constituting an attempted evasion of payment of taxes, and (3) willfulness. *Sansone v. United States*, 380 U.S. 343, 351 (1965). Neither Storm nor Ashfield challenge the proof of the first two elements of the crime; they contest only the proof of the last element -- willfulness.

For purposes of § 7201, willfulness is defined as the voluntary, intentional violation of a known legal duty. *See U.S. v. Pomponio*, 429 U.S. 10, 11-13 (1976) (per curiam); *U.S. v. Bishop*, 412 U.S. 346, 359-60 (1973). Willfulness may, however, be inferred from circumstantial evidence. The Supreme Court has made clear that willful tax evasion may be proven by a consistent pattern of underreporting large amounts of income and by the taxpayer's failure to include all his income on his books and records. *Holland v. U.S.*, 348 U.S. 121, 139 (1954). *See Spies v. U.S.*, 317 U.S. 492, 499 (1942). Likewise in this circuit, we have repeatedly held that repetitious conduct resulting in underpayment of taxes may be sufficient to show willfulness. *U.S. v. Alker*, 260 F.2d 135, 148 (3d Cir.

1958) ("consistent understatement [of tax liability] is evidence of willfulness"); *U.S. v. Frank*, 245 F.2d 284, 287-88 (3d Cir. 1957) (proof of a consistent pattern of underreporting "is itself enough" to sustain a jury finding of willful tax evasion). *See also U.S. v. Greenlee*, 517 F.2d 899, 903 (3d Cir. 1975) ("a two year pattern of derelictions ... [is] itself indicative of the willfulness."). Recently, our Court reversed a decision to acquit an accused tax evader, holding that the evidence was sufficient given the proof of a long-run pattern of reporting at variance with the taxpayer's defense, the substantiality of the sums the taxpayer failed to report, and the number of times taxpayer received income checks he claimed to have forgotten. *U.S. v. Doan*, 710 F.2d 124, 126 (3d Cir. 1983). Obviously, these decisions pertaining to the permissible scope of a jury's inferences from circumstantial evidence are necessarily fact-intensive and therefore not subject to easy generalization. Nonetheless, it is clear that a jury may find a defendant's tax evasion was willful wholly on the basis of inferential proof.

In the case at hand, the jury was carefully instructed on the meaning of willfulness. The court explained that

> in this case the attempt to evade or defeat the tax must be a willful attempt, that is to say it must be an attempt made voluntarily and intentionally and with specific intent to keep from the government a tax imposed by the income tax laws which it was the legal duty of the defendants to pay to the government and which the defendants knew it was their legal duty to pay.

App. at 895a. Having heard this definition as well as seven days of testimony, the jury found that both Ashfield and Storm were guilty of the crime charged in

their indictment -- that is, that they "did knowingly and willfully attempt to evade and defeat a large part of the income tax due and owing ... to the United States." App. at 891a; *see* App. at 892a, 910a-911a.

Given those verdicts, the trial court's ruling on the sufficiency of the evidence was governed by strict principles of deference to a jury's findings. In deciding whether to grant the motions for acquittal, the trial court was required to view the evidence in the light most favorable to the prosecution and to draw all reasonable inferences therefrom in the government's favor. *See Glasser v. U.S.*, 315 U.S. 60, 80 (1942); *U.S. v. Jannotti*, 673 F.2d 578, 598 (3d Cir. 1982) (in banc). Viewing the evidence in this light, the trial court was obliged to uphold the jury's verdict unless no rational jury could conclude beyond a reasonable doubt that the defendants willfully attempted to evade their tax obligations. *See Burks v. U.S.*, 437 U.S. 1, 16-17 (1978); *Doan, supra*, 710 F.2d at 127; *Jannotti, supra*, 673 F.2d at 598.

In our review of the sufficiency of the evidence, we must apply the same standard of deference to the jury's findings. *See Burks, supra*, 437 U.S. at 17; *U.S. v. Dixon*, 658 F.2d 181, 188 (3d Cir. 1981). Thus, we must independently re-examine the record and determine as a matter of law whether the evidence could support an inference of guilt beyond a reasonable doubt. *See Jannotti, supra*, 673 F.2d at 598. Our task is not to decide what we would conclude had we been the finders of fact; instead, we are limited to determining whether the conclusion chosen by the factfinders was permissible.

B.

After hearing argument on Storm's motion for acquittal, the district court announced that "there was more than ample evidence in the record to justify the

jurors in determining and assessing guilt of Mr. Storm beyond a reasonable doubt." App. at 994. We agree.

As the officer in charge of NTA's bookkeeping, Storm was responsible for producing the financial records which were in turn used by NTA's accounting firm to prepare the corporation's tax returns. App. at 174a, 234a. Most importantly, Storm's bookkeeping duties included the task of filling out the internal deposit slips. These slips designated the source of money being deposited in NTA's operating account and the particular category of the operating account -- such as officers' loans or commission income -- to which the money was to be credited. App. at 240a, 242a, 337a, 342a. Under NTA's accounting practices, unidentified deposits were treated as sales income. App. at 241a. The accountants could not credit a deposit to any category other than sales income without an express designation on the internal deposit slip or specific instructions from Storm himself. App. at 244a-45a, 342a, 419a, 421a, 436a. Consequently, any deposit credited as a repayment to the officers' loans account had to be requested -- directly or indirectly -- by Storm.

Between 1973 and 1975, a series of repayments to the officers' loan account followed a consistent pattern. In 1975, checks for $20,000 and $8,000 were drawn from the management trust account and deposited in the operating account as officers' loan repayments, divided equally between Storm and Ashfield. App. at 482a, 647a, 730a. In 1974, by the same procedure, $9,000 and then $6,000 from the trust account were credited as loan repayments. App. at 526a, 660a, 662a, 665a. Likewise in 1973, $6,500 and then $10,000 were transferred from the trust account to the loan account. App. at 661a-65a. For three consecutive years, therefore, the same method was used to understate the corporate income of NTA and the personal income of the defendants.

Appendix A

In view of Storm's control of the NTA books and especially the designation of deposits to the officers' loan account, a rational jury could conclude beyond a reasonable doubt that the three-year pattern of misreported loan repayments was the product of a voluntary and intentional effort by Storm to evade payment of taxes. When we consider, in addition, certain other inculpatory facts, we must conclude that the evidence against Storm rises well above the level necessary to sustain a guilty verdict. Storm had taught accounting, App. at 686a, and accordingly there can be little question that he understood the implications of crediting a deposit as an officers' loan repayment. More significantly, there is evidence that Storm sought to conceal the records pertaining to the management trust account and thereby evinced consciousness of the impropriety of using commission earnings to repay officers' loans. Before the IRS audit, none of NTA's accountants knew of the management trust account or of the separate ledger maintained for it. App. at 325a, 331a. When the IRS served a summons on NTA requesting all financial records, Storm produced no document containing any reference to the trust account and, through his attorney, claimed that the production was complete. App. at 689a-90a. Placed alongside the other evidence, this evidence of attempted concealment by a person trained in bookkeeping confirms that the district court properly denied Storm's motion for acquittal.

C.

Less compelling is the evidence against Ashfield because, in contrast to Storm, he did not directly participate in preparing NTA's bookkeeping entries. Nevertheless, viewing the evidence in the light most favorable to the government, as we must, we believe that the record was sufficient to sustain the jury's guilty verdict against Ashfield.

The district judge reached the opposite conclusion in a brief oral opinion that relies on *U.S. v. Forrest*, 620 F.2d 446 (5th Cir. 1980).[3] By focussing on the *Forrest* case, the district judge intimated his concern that Ashfield was convicted merely on the basis of his close business association with Storm. In *Forrest*, the Fifth Circuit held that a wife's guilty knowledge could not be inferred simply from the fact that she was married to the kingpin of a large-scale illegal operation. 620 F.2d at 451. The *Forrest* court emphasized:

> That one is married to, associated with, or in the company of a criminal does not support the

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3. The district court's analysis of the record consisted of the following statement:

> I am not going to recite chapter, line and verse of the evidence that bore upon the knowledge, the intent, the guilt, if you will, of Mr. Ashfield. It has been amply explored here by both counsel.
>
> The Court realizes also that it does not sit as a super jury to retry this case and [sic] if the jury had not rendered its verdict. Whether or not I would reach a different result as the trier of the facts is not the standard, and the [*U.S. v.*] *Gross*[, 375 F. Supp. 971 (D.N.J. 1974)] and *Curley* [*v. U.S.*, 160 F.2d 229 (D.C. Cir. 1947)] test which I have described here makes that clear.
>
> However, based upon what I consider to be well-reasoned precedent in *Untted States v. Forest* [sic], [620 F.2d 446 (5th Cir. 1980)], which I have cited earlier, I determine that giving indeed due regard to all of the functions of the jury here as the triers of the fact and the drawers of legitimate inferences, reasonable minds could not have concluded that all of the elements of the crime charged were established beyond a reasonable doubt as to the defendant Ashfield.
>
> The record and the evidence which might have served as a source for the jury's verdict in that respect was insufficient to permit the jury's verdict based upon that high standard and burden of proof.
>
> Accordingly, this Court will enter a judgment of acquittal with regard to the defendant Jerome Ashfield.

App. at 44a-45a.

> inference that that person is a criminal or shares the criminal's guilty knowledge.

Id. (footnotes omitted). We do not take exception with this statement; rather we believe that the evidence of Ashfield's participation in a tax evasion scheme goes well beyond a mere professional association with Storm.

Between 1973 and 1975, Ashfield borrowed $29,000 of corporate funds and spent it for such personal expenses as tuition payments for his child at Rider College and individual income tax payments to the IRS. App. at 532a, 534a. For a person whose maximum reported income during this three-year period reached approximately $41,000 in 1975, App. at 675a, these loans from NTA were not negligible. The jury could reasonably infer that Ashfield was aware of his substantial personal indebtedness to the corporation.

To repay this debt legally, Ashfield should have deposited funds from his personal, after-tax income in NTA's operating account and designated these deposits as repayments to his loan account. Ashfield did this only once, however, during the period 1973-75. In 1975, he endorsed a $4,000 salary check -- from which tax had been withheld -- and deposited it as a loan repayment. App. at 750a-51a. From this evidence, a rational jury could infer that Ashfield knew the proper method to be employed in repaying his loans from NTA.

In contrast to this one legal repayment of $4,000, the record shows that from 1973 to 1975 seven deposits totalling almost $60,000 were transferred from the trust account and credited one-half to Ashfield as loan repayments. App. at 674a-82a. This repetition of a particular transaction whereby corporate funds were used to repay the officers' personal debts would support an inference that the

deposits were being misreported by plan, not by accident. The question left open by this pattern of misreporting is whether Ashfield willfully participated in the arrangement, either by affirmative act or by tacit approval.

When we consider the record as a whole, we are persuaded based on the inferential proof that a jury could rationally conclude beyond a reasonable doubt that Ashfield at least tacitly approved of his fellow officer's tax evasion scheme. The record links Ashfield to one of the series of transactions by which the tax evasion scheme was implemented. In 1973, Ashfield wrote a $6,500 check on the trust account and deposited it in the operating account as a loan repayment, equally divided between him and Storm. App. at 661a. Each of the other six transfers of NTA income from the trust account to the officers' loan account during 1973-75 were evenly divided between Ashfield and Storm. Since nothing in the evidence indicates that NTA's accounting system ordinarily required the officers to repay their loans in equal and simultaneous sums, the jury could infer that the loan repayments were being shared intentionally. It seems improbable that Ashfield's business associate would be so scrupulously honest about splitting the profits of the tax evasion scheme if Ashfield were unaware of its existence. This inference is strengthened by the evidence that these loan repayments permitted Ashfield to escape a substantial proportion of his personal income tax during 1973-75, rising from nineteen per cent in 1973, to twenty per cent in 1974, and to thirty-six per cent in 1975. App. at 676a, 678a, 682a. These do not appear to be the sort of insignificant amounts that an experienced business executive would easily overlook.

Our review of this evidence is further influenced by Ashfield's substantial role in the management of a

successful enterprise. Since its incorporation in 1969, Ashfield was a fifty per cent shareholder and one of the two officers of NTA, a firm that realized gross income exceeding $452,000 in 1975. App. at 608a. As the corporation's vice president, Ashfield's responsibilities included supervising NTA's pension plan and investments. App. at 336a, 768a. Moreover, although Ashfield did not prepare NTA's bookkeeping records, he did attend financial meetings with the accountants. App. at 190a-91a, 324a-26a. At none of the meetings did he disclose the existence of the trust account. When he filled out a tax preparation questionnaire from the firm's accountants, Ashfield certified that there was no income other than that disclosed on the records of NTA's operating account. App. at 296a-98a, 764a-65a.

When Ashfield's managerial and ownership role at NTA is viewed alongside all the evidence of his profitable involvement with the officers' loan account, we believe that the record is adequate to support a jury finding that Ashfield willfully participated in a tax evasion scheme. The district court's judgment of acquittal must therefore be reversed. We do not , however, mean by this holding to foreclose the district court from reconsidering Ashfield's motion for a new trial. The district judge denied that motion "for the record," App. at 45a, without stating his reasons and immediately after granting Ashfield an acquittal. Consequently, his ruling may perhaps have been premised on the view that the acquittal mooted the motion for a new trial. Given our decision today, and the fact that the district judge's focus on *U.S. v. Forrest*, 620 F.2d 446 (5th Cir. 1980), may indicate his concern that the jury's deliberations were tainted by the spillover effect of evidence against Storm, we expressly leave open to the district court, in its discretion, the option of considering a renewed motion

for a new trial of Ashfield. *Cf. U.S. v. Dixon*, 658 F.2d 181, 193 (3d Cir. 1981).

III.

Having determined that the evidence was sufficient to support the guilty verdicts rendered against both defendants, we turn to Storm and Ashfield's[4] assertion that during their trial the district court committed reversible error.

A.

The defendants claim that the district court erroneously excluded a hearsay statement suggesting that the misreporting of income occurred by mistake. Specifically, the defense sought at trial to establish that Irwin Giblen, owner of NTA's accounting firm (Giblen & Co.), had characterized the treatment of the loan repayments as an "accounting error." Because Giblen died prior to trial, this comment could be admitted only as a "statement against interest" under Fed. R. Evid. 804(b)(3). After a special hearing on admissibility, the trial court ruled that this comment, at least as recalled by accountant Donald Smith, was not a statement against interest and was therefore inadmissible hearsay. Storm and Ashfield contend that this ruling constitutes an incorrect application of the rules of evidence.

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4. Most of Ashfield's brief is devoted to arguing that the district court correctly granted his motion for acquittal. Ashfield also argues, however, that if we reverse the judgment of acquittal, we should order a new trial because of purported trial errors of the district court. On these issues, Ashfield's brief incorporates the arguments pressed in Storm's brief, except for one claim based on newly discovered evidence. *See* Part IV, *infra*.

At the hearing held to determine the admissibility of the Giblen hearsay statement, Smith testified that prior to meeting with an IRS agent to discuss the investigation, he received instructions from Giblen as to "how to deal with the revenue agent." App. at 441a. Smith at first maintained that Giblen told him to say "an accounting error had been made," and that "an accountant had made a mistake." App. at 439a. But on cross-examination, Smith conceded that the "accounting error" explanation "may well have come from either Mr. Storm or Mr. Ashfield," App. at 446a, and finally acknowledged that no one other than Storm and Ashfield "would know whether there was an error." App. at 449a.

Following this hearing, the trial court found that "basically ... [Giblen's statement] is a position that is going to be taken with the IRS." App. at 453a. More importantly, the judge found that the statement was "not one which Mr. Giblen was necessarily adopting or endorsing or vouching for as being true." App. at 455a. Based on these findings, the court determined that Giblen's statement was not a statement against interest "either of himself or his company." App. at 453a.

Rule 804(b)(3) provides that an out-of-court statement by an unavailable witness is admissible if it was

> at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability ... that a reasonable man in his position would not have made the statement unless he believed it to be true.

Thus, an essential predicate for applying this rule is that the hearsay be objectively contrary to the

declarant's interest. In the case before us, the district court concluded that this prerequisite was lacking. Because, in the court's view, Giblen failed to "adopt[] or endors[e] or vouch[] for" the explanation, his statement was not objectively contrary to his interest and therefore did not satisfy Rule 804(b)(3)'s threshold requirement.

Reviewing this determination under the abuse of discretion standard, we are satisfied that the trial court properly exercised his discretion in excluding the Giblen hearsay. Two factors undergird our conclusion. First, Giblen's comment was so general that it never expressly assumed responsibility by a Giblen & Co. accountant: no accountant was named and no particular error was identified.[5] Second, Giblen made his statement after his firm had begun to act as a representative of Storm and Ashfield in the IRS investigation. Giblen seems to have been serving as a conduit for defenses suggested by his clients.

The defendants have suggested that the trial judge's exclusion of this hearsay is at odds with his decision to admit another Giblen hearsay statement. Allen Stockelberg, the second-in-command at Giblen & Co., was permitted to testify about Giblen's comments after an evidentiary hearing at which he reported Giblen as saying "we had fouled up." App. at 207a.[6] As we view this statement, it differs substantially from the excluded comments in that it approaches a direct and

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5. Indeed, despite all the testimony by accountants, no accounting error was ever identified at trial. Moreover, the Giblen & Co. accountant who actually worked on NTA's books during 1973-75, Maurice Fleinblatt, told Smith that no error was made. App. at 447a.

6. Before the jury, however, Stockelberg testified that Giblen had said the loan repayments "should have been handled differently." App. at 365a.

personal assumption of responsibility by Giblen & Co.'s owner. Certainly the district judge acted within his discretion in admitting this statement while excluding Donald Smith's recollection of Giblen's other comments.

B.

Storm and Ashfield also argue that the district court erred in refusing to grant a mistrial in order that the law firm representing Storm could withdraw from the case and one of its attorneys could take the stand. The defendants assert that the significance of the lawyer's testimony was not apparent until the government surprised them at trial with unexpected evidence that the lawyer could rebut and that the court's decision not to grant a mistrial effectively deprived them of their right to present a complete defense.

The issue arose when, at trial, an IRS special agent testified about a September 1978 meeting with Storm and his attorney, Jerome Miller. Storm was supposed to produce all of NTA's financial records for 1973-75, and, according to the special agent, Storm claimed that he had indeed produced all the documents required by the IRS summons. The IRS later discovered, through NTA's bank, that records for the management trust account were *not* produced, and this discovery ultimately led to the uncovering of the illegal loan repayments.

When the testimony regarding the missing documents was introduced, Storm moved for a mistrial. Storm argued that because Miller's law firm represented him at trial, and because Disciplinary Rules 5-101 and 5-102 of the Model Code of Professional Responsibility (1979) prevented Miller from testifying in a case in which his firm acted as

counsel, a mistrial was necessary to permit Storm to retain new counsel and to put Miller on the stand to impeach the special agent's report of the September 1978 meeting. The trial court refused to grant a mistrial, declaring that Storm's attorneys had "fully discharged their obligation" and that they fell under an exception to the rule because they were "now so completely immersed in this case" that they would "surely [provide] the most effective representation." App. at 628a-629a. Despite these assurances from the judge, the defense chose not to call Miller to the stand.

The district court's decision not to order a new trial because of this development was proper for two reasons. First, assuming for the moment that Storm was indeed surprised at trial by the special agent's testimony, the district court properly invoked an exception to the disciplinary rules. Although ordinarily a lawyer must withdraw from representation of a client when "it is obvious that ... a lawyer in his firm will be called as a witness on behalf of his client," Model Code, *supra*, DR 5-102(A), the Model Code permits an attorney to continue "[a]s to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in a particular case." *Id.* at DR 5-101(B). We agree with the district court that in view of the longtime involvement of Miller's law firm, both in the IRS investigation and in the trial preparation, the firm's withdrawal would have worked a "substantial hardship" on Storm.

Second, and more importantly, the record demonstrates that the defense knew the September 1978 meeting might well be brought up at trial. Far from being a "booby trap" -- the term used in Storm's brief -- the testimony by the IRS special agent was brought to the defense's attention with adequate time to prepare a response. Well before trial, the government

sent the special agent's memorandum of the September 1978 meeting to the defense as part of the *Brady* production. Once again during pretrial evidentiary rulings, the government moved to introduce Miller's statement during the September 1978 meeting as an adoptive admission of Storm. In light of these early warnings, we believe the government fairly characterizes Miller's failure to testify as a "tactical decision."

The defendants argue that they should have been specifically put on notice about the special agent's testimony on three other occasions: (1) when the prosecution moved to disqualify Miller's law firm; (2) when the prosecution moved for admission of a memorandum containing statements by Miller about the document production; and (3) when the prosecution agreed with Storm to stipulate to admission of NTA financial records without calling a document custodian. But this catalog of purported "concealment" by the government simply reaffirms the conclusion that, despite Miller's extensive involvement in the IRS investigation, and despite the innumerable points on which he could have testified, the defense intentionally chose to keep Miller's firm in the case. The September 1978 meeting was anything but an isolated "booby trap"; the prosecution's evidence was replete with such encounters, a fact the defense well knew. Having made the decision to use Miller's firm nonetheless, the defense is not persuasive in its contention that we should order a new trial to be conducted by other counsel.

C.

Storm and Ashfield's final claim of trial error arises from a statement by the prosecutor that they insist constitutes a comment on the defendants' failure to

take the stand. In his rebuttal summation, the Assistant United States Attorney stated:

> Sure trust accounts are common in business. There is nothing wrong with having a trust account. It is part and parcel of a business where you have client income. You heard no explanation of the reason why it was necessary to keep such a trust account secret except to avoid payment of taxes.

App. at 872a. Defense moved for a mistrial and curative instruction, but the judge ruled that "I didn't find anything offensive" and "I don't feel there is the likelihood of the jury drawing an improper inference." App. at 874a-875a. The judge gave only the standard cautionary instruction about not drawing inferences from a defendant's failure to testify.

In the circumstances of this case, we do not believe this comment required a mistrial. The "explanation" for the secrecy could have come from a number of witnesses. Trust accounts were discussed at length in the testimony of several Giblen & Co. accountants and a talent agency employee, and an explanation for the secrecy surrounding NTA's trust account could have been extracted from them if the defense so chose. Thus, when the prosecution asked rhetorically why no explanation was proffered, the question might just as well have referred to persons who took the stand. Since it was far from clear that the prosecutor's statement referred to the defendants, we believe that the judge acted within the proper scope of his discretion in refusing a mistrial.

IV.

On behalf of Ashfield alone, it is asserted that the district judge erroneously denied a post-verdict motion for a new trial based on the discovery of an

accountant's workpaper containing the notation "7500 - each officer was withdrawn to personal name from escrow account." According to Ashfield, the discovery of this document required a new trial because the notation proved that NTA's accountants knew of the existence of the management trust account, and therefore supported the claim that the underpayment of taxes resulted from an accounting error. To prevail on a motion for a new trial based on newly discovered evidence, a defendant bears the heavy burden of establishing five requirements: the evidence must be newly discovered; facts must be alleged from which the court may infer diligence on the part of the movant; the evidence must not be merely cumulative or impeaching; it must be material to the issues; and it must be such that, on a new trial, it would probably produce an acquittal. *U.S. v. Rocco*, 587 F.2d 144, 146 (3d Cir. 1978). We have carefully considered the document as well as the record on the basis of this exacting standard. In view of Ashfield's limited showing of diligence and failure to demonstrate that this new evidence would probably produce an acquittal, we are satisfied that the district judge properly exercised his discretion in refusing Ashfield a new trial on the ground of this newly discovered document.

V.

The judgment of conviction against Storm will be affirmed. The judgment of acquittal in favor of Ashfield will be reversed, and Ashfield's case will be remanded to the district court for action consistent with this opinion.

Appendix A

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

(Filed—May 12, 1983)

Judgment and Probation Commitment Order dated May 10, 1983, and Conditions of Probation and Order of Release dated May 10, 1983, attached thereto

Received: Allyn Z. Lite, Clerk, the District of New Jersey. May 12, 1983. 11:18 A.M. Docket No. CR. 82-125.

Defendant: Sanford Storm.

Counsel: With counsel, Howard Cohen, Esquire.

Plea: Not guilty.

Finding and Judgment: Guilty on count 7 of original indictment (count 1 of redacted indictment). Defendant has been convicted as charged of the offense of income tax evasion, 26: 7201.

Sentence or Probation Order: The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two (2) years; and on condition that the defendant be confined in a jail-type or treatment institution for a period of ninety (90) days, the execution of the remainder of the sentence of imprisonment is hereby suspended and the defendant placed on probation for a period of three (3) years to commence upon the defendant's release from confinement.

Appendix B

Special Conditions of Probation: IT IS FURTHER ORDERED that the defendant be fined $5,000. and that said fine be paid within (9) months from this date or stand committed.

FURTHER ORDERED the defendant is to submit financial records to the probation office as requested particularly income tax returns.

FURTHER ORDERED the execution of sentence be stayed pending appeal.

Dated: May 10, 1983

/s/ JOHN W. BISSELL,
U.S.D.J.

Appendix B

CONDITIONS OF PROBATION

UNITED STATES DISTRICT COURT

For the District of New Jersey

Docket No. Cr. 82-00125-01

To: Sanford Storm.

Address: 101 W. Lindsley Road, Cedar Grove, New Jersey.

In accordance with authority conferred by the United States Probation Law, you have been placed on probation this date, May 10, 1983, for a period of three years by the Hon. John W. Bissell, United States District Judge, sitting in and for this District Court at Trenton, N.J.

It is the order of the Court that you shall comply with the following conditions of probation:

(1) You shall refrain from violation of any law (federal, state, and local). You shall get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer.

(2) You shall associate only with law-abiding persons and maintain reasonable hours.

(3) You shall work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. When out of work you shall notify your probation officer at once. You shall consult him prior to job changes.

(4) You shall not leave the judicial district without permission of the probation officer.

(5) You shall notify your probation officer immediately of any change in your place of residence.

(6) You shall follow the probation officer's instructions.

(7) You shall report to the probation officer as directed.

The special conditions ordered by the Court are as follows: Committed to the custody of the Attorney General for two years, and on condition that the defendant be confined in a jail-type institution for 90 days, the execution of the remainder of the sentence of imprisonment is hereby suspended and defendant placed on probation for 3 years to commence upon release from confinement. Fine of $5,000 to be paid within 9 months or stand committed. Special Condition: To submit financial records to the probation office as requested, particularly income tax returns. You shall carry out all rules, in addition to the above, as prescribed by the Chief U.S. Probation Officer, or any of his associate Probation Officer.

I understand that the Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

Appendix B

I have read or had read to me the above conditions of probation. I fully understand them and I will abide by them.

/s/ Illegible
Probationer

Dated: May 10, 1983.

You will report as follows:

Mail written reports on the last day of the month to the U. S. Probation Office, 100 Hamilton Plaza, Post Office Box 2097, Paterson, N.J. 07509.

/s/ Illegible
U.S. Probation Officer

Dated: May 10, 1983.

Appendix B

ORDER OF RELEASE

UNITED STATES DISTRICT COURT

For the District of New Jersey

Crim. No. 82-125

UNITED STATES OF AMERICA

vs.

SANFORD STORM

It is, on this 10th day of May, 1983, ORDERED:

That bail be fixed at $10,000 and the defendant be released upon:

a. Executing an unsecured appearance bond.

b. Executing an appearance bond and depositing in cash in the Registry of the Court % of the bail fixed.

c. Executing an appearance bond with approved sureties, or the deposit of cash in the full amount of the bail in lieu thereof, without 10% cash alternative.

It is further Ordered that the Clerk furnish to the defendant a copy of this order and a notice of the penalties applicable to violation of conditions of release.

/s/ John W. Bissell
U. S. D. J.

Appendix B

I hereby certify that the defendant was furnished (personally—by mail) a copy of this Order and a Notice of Penalties Applicable To The Violation of Conditions of Release.

John T. O'Brien
Deputy Clerk

APPENDIX C

Applicable Provisions of the United States Constitution and Other Authorities

Fifth Amendment and Sixth Amendment of the United States Constitution

Constitutional Amendment Involved:

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; or shall any person be subject for the same offense to be twice put in jeopardy of life or limb; or shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Appendix C

RELEVANT PORTIONS OF ABA CODE OF PROFESSIONAL RESPONSIBILITY:

Disciplinary Rules:

DR 5-101 (B) A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:

(1) If the testimony will relate solely to an uncontested matter

(2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.

(3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.

(4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

DR 5-102 (A) If, after understaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B)(1) through (4).

Appendix C

Ethical Considerations:

EC 5-9 Occasionally a lawyer is called upon to decide in a particular case whether he will be a witness or an advocate. If a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibiliy. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.

EC 5-10 Problems incident to the lawyer-witness relationship arise at different stages; they relate either to whether a lawyer should accept employment or should withdraw from employment. Regardless of when the problem arises, his decision is to be governed by the same basic considerations. It is not objectionable for a lawyer who is a potential witness to be an advocate if it is unlikely that he will be called as a witness because his testimony will relate only to an uncontested issue. In the exceptional situation where it will be manifestly unfair to the client for the lawyer to refuse employment or to withdraw when he will likely be a witness on a contested issue, he may serve as advocate even though he may be a witness. In making such decision, he should determine the personal or financial sacrifice of the client that may result from his refusal of employment or withdrawal there-

from, the materiality of his testimony and the effectiveness of his representation in view of his personal involvement. In weighing these factors, it should be clear that refusal or withdrawal will impose an unreasonable hardship upon the client before the lawyer accepts or continues the employment. Where the question arises, doubts should be resolved in favor of the lawyer testifying and against his becoming or continuing as an advocate.

APPENDIX D

Order for Stay of the United States Court of Appeals of the Third Circuit with Attachment

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 82-5433, 83-5380 and 83-5384

UNITED STATES OF AMERICA

vs.

JEROME ASHFIELD,

Appellant in Nos. 83-5344 and 83-5384

SANFORD STORM,

Appellant in No. 83-5380

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until August 1, 1984.

ARLIN M. ADAMS
Circuit Judge

Dated: June 22, 1984

Appendix D

Office of the Clerk
UNITED STATES COURT OF APPEALS
for the Third Circuit
21400 United States Courthouse
Independence Mall West
601 Market Street
Philadelphia 19106

SALLY MAVOS
Clerk

Telephone
215-597-2995

June 22, 1984

Lawrence S. Feld, Esquire
Kostelanetz & Ritholz
80 Pine Street
New York, New York 10005

Howard D. Cohen, Esquire
Gutkin, Miller, Shapiro & Selesner, P.A.
225 Millburn Avenue
Millburn, New Jersey 07041

Re: U.S.A., Appellant in No. 83-5344 vs. Sanford Storm, Appellant in No. 83-5380 vs. Jerome Ashfield, Appellant in No. 83-5384

Dear Counsel:

Enclosed herewith is a conformed copy of order filed

If during the period of the stay we receive notification from the Clerk of the Supreme Court that a petition for today staying the issuance of the mandate to August 1, 1984, in the above entitled cases.

writ of certiorari has been filed, the stay shall continue until final disposition by the Supreme Court.

Very truly yours,

Sally Mrvos, Clerk
By: Betty J. Robinson
Betty J. Robinson
Deputy Clerk
Direct Dial
597-3134

ml

cc: Faith S. Hochberg, Esquire
Lawrence S. Horn, Esquire